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ALEXANDER L. STEVAS,
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No. 82-1542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES HEWITT, et al.,

Petitioners,

v.

W. E. STRICKLAND, WAYNE SMITH, BILLY MIXON, BILLY HANCOCK, FRANK THOMAS, JIM GOOLSBY and RUTH MARTIN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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April 18, 1983

QUESTIONS PRESENTED

1. Whether Georgia's tax remedies are "plain, speedy and efficient" with the result that Petitioners' § 1983 action against the State Revenue Commissioner and local tax officials is barred by the Tax Injunction Act, 28 U.S.C. § 1341?

2. Whether Georgia's tax remedies are "plain, adequate and complete" with the result that Petitioners' § 1983 action against the State Revenue Commissioner and local tax officials is barred by the principle of comity?

3. Whether Petitioners' § 1983 action against the State Revenue Commissioner and local tax officials was "frivolous, unreasonable and without foundation" with the result that attorney's fees could be awarded to the State Revenue Commissioner and local tax officials under the authority of 42 U.S.C. § 1988?

4. Did the attorney for Petitioners fail to appeal the judgment against him with the result that the question of the validity of the assessment of attorney's fees against him is not before this Court?

5. Assuming, *arguendo*, that Petitioners' attorney properly appealed the judgment against him in the district court and properly applied for certiorari in this Court, were his actions in filing the present litigation such that attorney's fees were properly assessed against him under either the inherent powers of the district court or under 42 U.S.C. § 1927?

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STATEMENT OF THE CASE

I.

PROCEEDINGS BELOW

James Hewitt and other taxpayers from Spalding County, Georgia (hereinafter referred to collectively as the "Petitioners") filed their Complaint in the United States District Court for the Northern District of Georgia, Newnan Division, against the Revenue Commissioner of the State of Georgia and six named individuals who comprise the Board of Tax Assessors and Board of Commissioners of that county (said individual county officials hereinafter collectively referred to as the "Tax

Officials"). Petitioners' Complaint, based upon alleged violations of their constitutional rights, sought temporary and permanent injunctions, attorneys' fees and expenses incurred in successful ad valorem taxation challenges in the state courts, and attorneys' fees and costs for the lawsuit in the district court. The Revenue Commissioner filed a Motion to Dismiss on the grounds of lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, *res judicata* and collateral estoppel. The Tax Officials filed a Motion to Dismiss for lack of subject matter jurisdiction. All defendants prayed in their original responses that, upon dismissal of the complaint, attorney's fees be awarded under 42 U.S.C. § 1988.

On February 2, 1982 the district court entered an order which found that the Petitioners' Complaint was barred both by the Tax Injunction Act, 28 U.S.C. § 1341, and by the principle of comity. That order also found that "the plaintiffs and plaintiffs' counsel have asserted claims that are frivolous, unreasonable and without foundation, and that the defendants are entitled to an award of reasonable attorney's fees in this action." The order also stated that attorney's fees would be assessed against Petitioners' counsel personally under the authority of 28 U.S.C. § 1927. Counsel for the Revenue Commissioner and the Tax Officials were given fifteen days to submit affidavits itemizing the number of hours spent in litigation, the type of services performed, and the suggested hourly rate. The Petitioners then filed a Motion to Alter and Amend Order & Judgment. Counsel for Petitioners filed an unsigned and unsworn affidavit in support of that motion.

Counsel for the various defendants filed affidavits con-

cerning attorney's fees as required by the Order of February 2, 1982. Then, Petitioners filed a response to the affidavit of the Revenue Commissioner, a brief in support thereof, and an affidavit expressing counsel's own opinions concerning the work needed to defend the action brought by Petitioners. No response was made to the affidavit filed by counsel for the Tax Officials.

On April 2, 1982, the Court's order denying reconsideration and setting the amount of attorneys' fees to be awarded was entered. That order made detailed findings concerning the factors outlined in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974) and awarded against Petitioners and Petitioners' counsel $984.00 in attorney's fees for the Revenue Commissioner and $685.74 in attorney's fees and expenses for the Tax Officials. Judgment was entered on April 5, 1982 against both Petitioners and their counsel personally. Notice of Appeal and an Appeal Bond on behalf of Petitioners were filed on April 8, 1982. Counsel for Petitioners did not appeal and did not file a personal appeal bond.

On Sept ..ber 28, 1982, the United States Court of Appeals for the Eleventh Circuit affirmed the judgments and rulings of the district court. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Eleventh Circuit on November 18, 1982.

II.

STATEMENT OF FACTS

The only "facts" relevant to the issue of the propriety of the dismissal of Petitioners' complaint are the Georgia laws dealing with the assessment of property taxes, the alleged violations of Petitioners' constitutional rights and the nature of the relief sought by the Petitioners.

The relevant Georgia statutes are Off. Code of Ga. Ann. §§ 48-5-271, 48-5-306 and 48-5-311 (1981) [Ga. Code Ann. §§ 91A-1413, 1448 and 1449 (1933)]. These statutes set forth the procedures with respect to the assessment of property taxes and challenges to any such assessments. The purported constitutional violations deal with alleged unequal treatment of ad valorem taxes with respect to persons or entities who make their returns to local (county) tax officials, on the one hand, as compared to persons or entities whose returns are made to the State Revenue Commissioner, on the other hand; due process violations were also alleged. Among the contended due process violations were the alleged failure of the Tax Officials to comply with the orders of the Superior Court of Spalding County, Georgia, lack of qualified appraisers as required by Georgia law and lack of procedural safeguards at one administrative level, the Board of Equalization. The types of relief sought by Petitioners in their complaint were temporary and permanent injunctions, damages in the nature of attorney's fees and expenses incurred in appealing administrative decisions to the Superior Court of Spalding County, Georgia and the attorney's fees and costs of Petitioners' action in federal court.

Significantly, Petitioners' complaint contains numerous references as to how they were successful in obtaining relief for their complaints from the Superior Court of Spalding County, Georgia.

The relevant facts with respect to the district court's awarding attorney's fees and expenses to the Revenue Commissioner and the Tax Officials consist almost exclusively of a comparison of the complaint filed in the case at bar with Petitioners' complaint brought in the name of Charles Moss in September 1980 and the amend-

ment offered to that lawsuit while it was on appeal to the Fifth Circuit. The first nine paragraphs of the complaint in this action consist of photocopies of most of the prior complaint. The tenth paragraphs are identical with the exception of twelve words inserted in the newer complaint. Many of the remaining paragraphs of the new complaint merely paraphrase paragraphs contained in the amendment offered on appeal in the previous suit. That suit did not seek injunctive relief but prayed for damages in the amount of "excessive and exhorbitant taxes" paid by Petitioners over a period of twenty years plus $21,000.00 in legal fees and court expenses "to enforce their federal constitutional rights" in the state courts. The Honorable G. Ernest Tidwell, United States District Judge, dismissed the first complaint under 42 U.S.C. § 1341 in an Order dated February 13, 1981. That dismissal was appealed to the Fifth Circuit in which Petitioners offered an amendment to the complaint, which amendment contains many of the allegations found in the present lawsuit. On September 11, 1981 the Fifth Circuit affirmed the lower court's judgment and, while not allowing the proffered amendment, specifically stated that said amendment "would not affect the decision here, required by prior holdings of this Court." *Moss v. State of Georgia*, 655 F.2d 668, 670 (5th Cir. 1981). Then, only *forty-eight* days after the Fifth Circuit's opinion the present lawsuit was filed.

The facts relevant to the issue of the amount of attorney's fees awarded to the defendants were contained in affidavits of counsel for the Revenue Commissioner and Tax Officials and the opposing affidavits and responses filed by Petitioners. In summary, counsel for the Revenue Commissioner and counsel for the Tax Officials swore to their experience, the type of work performed, the

amount of time spent on the work, and the rates per hour requested. The response filed by Petitioners against the evidence submitted by the Revenue Commissioner argued that the Revenue Commissioner's counsel (and apparently these Tax Officials' counsel) "had already performed the research required in this case in order to respond to the *Moss* Complaint except for the minimal research required in relation to his application contained therein for award of attorney's fees."

SUMMARY OF ARGUMENT

Petitioners filed their lawsuit under 42 U.S.C. § 1983 against various tax officials and prayed for injunctive relief, attorneys' fees and expenses for prior actions in state courts and attorneys' fees and costs in the federal court. Georgia's remedies available to taxpayers such as Petitioners are both "plain, speedy and efficient" and "plain, adequate and complete" with the result that Petitioners' action was barred by the Tax Injunction Act, 28 U.S.C. § 1341, and the principle of comity.

Petitioners' lawsuit was filed a mere forty-eight days after the Fifth Circuit had affirmed the dismissal of a virtually identical lawsuit filed by sixty-six of the sixty-seven Petitioners in the case at bar. Under these facts and in light of prior opinions of this Court with respect to the remedies sought by Petitioners, the filing of the instant litigation was clearly "frivolous, unreasonable and without foundation" with the result that attorneys' fees were properly assessed against Petitioners.

Petitioners' counsel, who purports to be an additional Petitioner in this Court, did not join in the appeal from the judgment of the district court to the court of appeals and, accordingly, he is not a proper Petitioner in this

Court. Assuming, *arguendo*, that Petitioner's counsel is a proper Petitioner in the case at bar, his actions in filing the second § 1983 action against the Revenue Commissioner and Tax Officials authorized the award of attorneys' fees against him both under 28 U.S.C. § 1927 because he unreasonably and vexatiously multiplied the proceedings and under the inherent power of the district court because the filing of the second complaint constituted a wilful abuse of the judicial process.

ARGUMENT AND CITATION OF AUTHORITY

Rule 17.1 of this Court sets forth examples of those types of cases for which the granting of ceriorari might be appropriate. The case at bar does not fit even remotely any of the examples set forth in that Rule. To the contrary, the purported issues set forth by Petitioners raise no questions which have not previously been answered by this Court and various courts of appeal; furthermore, the decisions rendered by the district court and the federal court of appeals in the case at bar follow both the letter and the intent of prior decisions of this Court.

I.

PETITIONERS' ACTION IS BARRED BY BOTH THE TAX INJUNCTION ACT AND THE PRINCIPLE OF COMITY.

The Tax Injunction Act, 42 U.S.C. § 1341, forbids a district court to "enjoin, suspend or restrain the assessment, levy or collection" of any state taxes when that particular state's laws provide "a plain, speedy and efficient remedy in the courts of that state." *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). The *Rosewell* case also held that the inability to obtain interest on

refunds for taxes which had been paid under protest over two years before did not render Illinois' remedy less than "plain, speedy and efficient." *Id.* at 528. *A fortiorari*, the inability to obtain attorneys' fees and expenses (the only relief other than injunctive relief sought by Petitioners), to which there is no inherent right in the American system of jurisprudence in the absence of statute or inherent power of a court, would not render the Georgia statutory scheme for challenging taxes less than "plain, speedy and efficient."

Federal lawsuits by taxpayers seeking monetary damages against tax officials are barred by the principle of comity if state remedies are "plain, adequate and complete." *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, ___ U.S. ___, 102 S. Ct. 177 (1981).[1] Furthermore, the words "plain, speedy and efficient" for purposes of applying the Tax Injunction Act will have the same meaning as "plain, adequate and complete" for the purpose of applying the principle of comity and federal court decisions which have treated the adequacy of state remedies for the purpose of the Tax Injunction Act are proper authority for applying the principle of comity. 102 S. Ct. at 186, n. 8.

Several federal decisions have held that Georgia provides a "plain, speedy and efficient remedy" by which taxpayers might challenge the assessment of ad valorem taxes. *Moss v. State of Georgia*, 655 F.2d 668 (5th Cir. 1981); *Adams v. Smith*, 415 F. Supp. 787 (N.D. Ga. 1976), *aff'd*, 568 F.2d 1232 (5th Cir. 1978); *see also, Kiker v.*

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[1] *Fair Assessment* did not decide whether or not the Tax Injunction Act barred such suits for damages against tax officials; however, such a holding has been made in the Fifth Circuit in Bland v. McHann, 463 F.2d 21 (5th Cir. 1972).

Hefner, 409 F.2d 1067 (5th Cir. 1969). These federal decisions are fully in accord with the decisions of this Court. In *Rosewell*, this Court held that the "plain, speedy and efficient" language requires "certain minimal *procedural* criteria." 450 U.S. at 512 (emphasis in original). The remedies must provide a "full hearing and judicial determination" at which the taxpayers might raise any constitutional objections which they might have. *Id.* at 514 (quoting *LaSalle National Bank v. County of Cook*, 51 Ill. 2d 318, 324, 312 N.E.2d 252, 255-256 (1974)).[2]

The Petitioners argue, without citations of authority, that if their 42 U.S.C. § 1983 action is not pemitted in federal court, they will forever lose their rights to seek redress for the many alleged constitutional violations. The simple answer to this "catch-all" argument is that "[a] civil litigant may, of course, seek review in this [Supreme] Court of any federal claim properly presented in and rejected by state courts." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 605 (1975), as cited in *Fair Assessment*, 102 S. Ct. 177, 186. Furthermore, any arguments Petitioners might make that the Georgia remedy is not "plain, speedy and efficient" or "plain, adequate and complete," are belied by their admissions that they were successful in obtaining relief from their complaints from the Superior Court of Spalding County, Georgia.

In summary, Georgia's remedies available to taxpayers such as Petitioners meet all the requirements set forth by this Court and, accordingly, their § 1983 action in the District Court was barred both by the Tax Injunction Act and the principle of comity.

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[2] *See also* California v. Grace Brethren Church, ___ U.S. ___, 102 S. Ct. 2498, 2509-2510 (1982).

II.

ATTORNEY'S FEES WERE PROPERLY ASSESSED AGAINST PETITIONERS BECAUSE THEIR COMPLAINT IN THE DISTRICT COURT WAS FRIVOLOUS, UNREASONABLE AND WITHOUT FOUNDATION.

In *Hughes v. Rowe*, 449 U.S. 5 (1980) this Court stated that attorneys' fees may be awarded in § 1983 actions if the district court finds "that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 14, quoting *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). Again referring to the *Christianburg Garment Co.* case, this Court noted that the district court might also award attorney's fees if "the plaintiff continued to litigate after it clearly became [frivolous, unreasonable or groundless]." 449 U.S. at 15.

On September 11, 1981 the Fifth Circuit issued its opinion in *Moss v. State of Georgia, supra.* A mere forty-eight days later Petitioners initiated this lawsuit with numerous allegations taken verbatim from the *Moss* complaint and other allegations taken from their proffered amendment in that case. Sixty-six of the sixty-seven Petitioners in this action were plaintiffs in *Moss.* The only person who was not a named plaintiff in *Moss* is James Hewitt, the first named plaintiff in the case at bar.

A comparison of the two complaints shows shocking similarities; the first eleven paragraphs of each are identical and, in fact, the first nine paragraphs of the complaint in this case are a photocopy of the first few pages of the complaint in *Moss.* Any allegations in the present lawsuit which differ from the allegations in the prior lawsuit are either taken from the proffered amendment in

the previous litigation or add nothing whatever of substance to the question of whether or not Petitioners' action is maintainable.[3] Most significant of all, the relief sought in the present litigation, *i.e.* injunctive relief and attorney's fees, is even more clearly prohibited by the Tax Injunction Act and comity.

Faced with these facts, there can be little amazement that the district court specifically found that the claims in the present litigation are "frivolous, unreasonable and without foundation."

Petitioners argue that the district court must hold an inquiry and make findings of fact in support of any conclusion that a claim was void of arguable merit. In the case at bar, the Revenue Commissioner and the Tax Officials moved for attorneys' fees from the outset and, after the district court's order finding that they were entitled to attorneys' fees, submitted detailed affidavits in support of the amount of attorneys' fees. Petitioners submitted numerous responses and affidavits and, only after the filing of those responses and affidavits, did the district court render its detailed order following the criteria set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

The next argument raised by Petitioners is that it was not until the issuance of the opinion in *Fair Assessment*

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[3] In Moss v. State of Georgia, the Fifth Circuit commented as follows concerning the amendments which were proffered in that court:

> In any event, the amendments, which only further allege this action is not barred by the Tax Injunction Act and that Georgia has failed to provide a plain, speedy and efficient remedy, would not affect the decision here, required by prior holdings of this Court.

655 F.2d at 670.

that their theories with respect to the Tax Injunction Act and comity were found lacking by this Court. They also argue that four justices of this Court supported their basic theories. Such arguments are clearly misleading. First, Petitioners' arguments were answered adversely in *Moss v. State of Georgia* and they made no attempt whatever to seek certiorari in that case. Second, Petitioners were faced both with numerous federal court decisions stating that Georgia's remedies were "plain, speedy and efficient" and with this Court's opinion in *Rosewell* which clearly demonstrated that the relief sought in their complaint was barred by the Tax Injunction Act.

In summary, Petitioners' bringing of this action under the circumstances present was not only frivolous, unreasonable and without foundation but was also in bad faith. Furthermore, Petitioners were given more than adequate notice of the intent to recover attorneys' fees and were given ample opportunity to argue the amount of attorneys' fees. While Petitioners chose to submit affidavits in opposition to the attorneys' fees awarded to the Revenue Commissioner, no such responses or affidavits were filed with respect to attorneys' fees awarded to the Tax Officials.

III.

THE AWARDING OF ATTORNEYS' FEES AGAINST PETITIONERS' COUNSEL, MARSON G. DUNAWAY, JR., IS NOT PROPERLY BEFORE THIS COURT.

The judgment of the district court awarded attorneys' fees and expenses "jointly and severally" against Petitioners and their attorney, Marson G. Dunaway, Jr. Petitioners' Notice of Appeal of April 8, 1982 states that only the "plaintiffs" were parties to the appeal and the

appeal bond covered only James Hewitt, the named plaintiff.

Rule 3(c) of the Federal Rules of Appellate Procedure requires that the Notice of Appeal "shall specify the party or parties taking the appeal." The failure to comply with this rule deprived the appellate court of jurisdiction over the alleged appeal of Mr. Dunaway. *Cf. Cook & Sons Equip., Inc. v. Killen*, 277 F.2d 607 (9th Cir. 1960); *Covington v. Allsbrook*, 636 F.2d 63 (4th Cir. 1980).

The reported decisions contain few cases dealing with appeals from judgments for attorneys' fees or costs against counsel; however, those cases list the attorneys as actual appellants. *See, Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163 (7th Cir. 1968). The opinion of the Eleventh Circuit in this case contains the following:

> We note that the Notice of Appeal does not indicate that Plaintiffs' attorney appealed the award of attorneys' fees assessed against him. Giving plaintiffs' attorney the benefit of an appeal nevertheless, we affirm the district court's award of fees against him . . .

The Tax Officials submit that Mr. Dunaway was not an Appellant in the Eleventh Circuit Court of Appeals and, accordingly, he could not possibly be a Petitioner before this Court. The propriety of this argument is supported by Rule 19.6 of this Court which states, in relevant part, as follows: "All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this court, . . ."

IV.

ASSUMING, ARGUENDO, THAT MR. DUNAWAY IS PROPERLY BEFORE THIS COURT AS A PETITIONER, THE JUDGMENT AGAINST HIM FOR ATTORNEYS' FEES WAS AUTHORIZED BY BOTH 28 U.S.C. § 1927 AND THE INHERENT POWER OF THE DISTRICT COURT.

In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), this Court dealt with the assessment of attorneys' fees against an attorney in a civil rights action. That decision made it clear that a district court has the inherent power to assess attorneys' fees against an attorney who might "wilfully abuse judicial processes." That same opinion held that 28 U.S.C. § 1927 could not be used to assess attorneys' fees against an attorney who "multiplied the proceedings in any cause . . . so as to increase costs unreasonably and vexatiously." However, 28 U.S.C. § 1927 was amended in September of 1980 to expressly authorize attorneys' fees to be included in the costs that might be assessed against an attorney in the appropriate circumstances.[4]

In the case at bar, the district court made specific findings that Petitioners' attorney, Mr. Dunaway, had "unreasonably and vexatiously multiplied the proceedings in this action," thereby authorizing the assessment of attorneys' fees against Mr. Dunaway under 28 U.S.C. § 1927. The Eleventh Circuit, with the entire record before it, did not deal with 28 U.S.C. § 1927 but found specifically that the award of attorneys' fees against him was proper "under the inherent power of the district court to tax attorneys' fees against counsel who wilfully abuse judicial process, something plaintiffs' attorney did in this case by filing and prosecuting the complaint now before us."

[4] Pub. L. No. 96-349, § 3, 94 Stat. 1156.

CONCLUSION

The procedure set up under Georgia law for challenging the assessment of ad valorem taxes affords Petitioners more than sufficient procedural safeguards to ensure that they may challenge such taxes under the Constitution and laws of the United States. Accordingly, their 42 U.S.C. § 1983 action against the Revenue Commissioner and Tax Officials is barred both by the Tax Injunction Act and the principle of comity. Furthermore, the circumstances surrounding the filing of this second lawsuit and a comparison of this lawsuit with the previous lawsuit brought by Petitioners clearly authorized the awards of attorneys' fees and expenses against Petitioners and their attorney.

All of the rulings of the district court and the appellate court are in accord with the decisions of this Court and this petition for certiorari raises no issues which would warrant review by this Court. For these reasons, the Tax Officials respectfully request that the petition for a writ of certiorari be denied.

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By: _____

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